NO. 83-388

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

E-SYSTEMS, INC.,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

HOWARD R. CLYMER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ATTORNEYS FOR RESPONDENTS

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PARTIES BELOW

In the Court below, the Petitioners, E-Systems, Inc. and Liberty Mutual Insurance Company, were the Petitioners/Appellees; the Respondent, Howard R. Clymer, was Petitioner/Appellant, and the Director, Office of Workers' Compensation Programs, United States Department of Labor, was the Respondent/Appellee.

TABLE OF AUTHORITIES

STATEMENT OF FACTS

Respondent, Howard R. Clymer, in June of 1976, closed down his own heating and air conditioning business and began employment with E-Systems, Inc. as a heating/air conditioning mechanic. He was assigned to the Sinai Field Mission in Israel. (Tr. at 29-33).

Mr. Clymer arrived in Israel to find that he was not being utilized in the capacity for which he had been hired, but was directed to perform manual labor. (Tr. at 38-43, 45-46).

The record reflects that Mr. Clymer was an excellent employee, not a malingerer nor a malcontent and was commended by his superior for his cooperation toward achieving the objective of the Mission in Israel. (Tr. at 43-44).

After approximately six months of duty involving construction and related manual labor, Mr. Clymer first experienced the symptoms which related to his disability. At the time of the manifestation of his dysfunctions, Mr. Clymer was taken to the Sinai Field Mission Health Clinic. There, the E-Systems paramedics noted that the patient was having dizzy spells, numbness, above normal blood pressure, was not a heavy drinker, was not a smoker, and was not a complainer (emphasis in original medical record), and that a medical doctor ordered that Mr. Clymer be moved to the nearest full medical facility at once. (Tr. at 49, 243; Sinai Field Mission Health Record, dated 7 Dec 76 and submitted by letter on October 15, 1979). There is no dispute that Mr. Clymer was totally dependent on E-Systems at all times while working at the isolated Sinai Field Mission which was located in the Sinai Desert.

Mr. Clymer was hospitalized for a week at Rafidine which was the nearest medical facility (Tr. at 55) and then returned to work at the Sinai Field Mission. After his return he began to perform more duties related to his heating/air conditioning work. (Tr. at 57-58).

Mr. Clymer continued to experience intermittent headaches and nausea and periodically visited the paramedics for

medical supervision and treatment. (Tr. at 155).

A second disabling episode occurred in mid-1977 and a third attack occurred in January of 1978. This last episode resulted in hospitalization for twelve days. (Tr. at 155-160). E-Systems medical personnel determined that it was essential that Mr. Clymer be medically evacuated from the Sinai Field Mission for proper medical testing in the United States. (Tr. at 159-160). Mr. Clymer was not returned to the United States for substandard work performance or for any reason other than his remarkable medical deterioration.

Immediately upon his return to the United States, Mr. Clymer reported to Dr. Dunn, his treating physician, who conducted medical tests which resulted in a diagnosis of indefinite disability. Testimony at the hearing before the Administrative Law Judge indicated that Mr. Clymer's condition had not changed significantly since his return from Israel in February of 1978, with the exception of some control of the blood sugar level by diet restriction.

Dr. Dunn testified that the camp diet at the Sinai Field Mission, consisting of high carbohydrate and high salt intake and the work environment, which involved excessive heat and physical stress, were both contributing causes in the development of Mr. Clymer's medical dysfunctions. Petitioner's medical expert testified that Respondent had a pre-existing disposition toward these dysfunctions. (Tr. at 141-43).

The Petitioner's medical expert, Dr. Robert L. North, reviewed Mr. Clymer's medical record and very briefly consulted with him prior to testifying in the hearing before the Administrative Law Judge. (Tr. at 123). Dr. North testified that Mr. Clymer's medical problems, which included hypertension and diabetes, were things that may be aggravated by dietary and even environmental influences, although he opined that they would not be caused by such. Dr. North, who had no reason to doubt the Respondent's medical complaints, was unable to define any medical condition as a diagnostic basis to account for Mr. Clymer's

symptoms. (Tr. at 94-95, 112, 121).

Mr. Clymer filed a claim for compensation under the LHWCA and a formal hearing was convened before an Administrative Law Judge (ALJ) in Dallas, Texas. The ALJ determined that Mr. Clymer had failed to prove injury caused by employment and that Mr. Clymer's claim was not timely filed. The decision of the ALJ was affirmed by the Benefits Review Board, but on different grounds; that being that Mr. Clymer had failed to establish a causal link between his employment and the disability asserted.

An appeal was taken to the Court of Appeals for the Fifth Circuit which reversed the decisions of the Benefits Review Board and the ALJ and found as a matter of law that the conclusion of the ALJ on the issue of aggravation was not supported by the requisite quantum of evidence, and the admissions of the Petitioner's medical expert conclusively established the Respondent's right to relief under the LHWCA.

The Fifth Circuit also held that since no medical evidence was offered by E-Systems addressing whether Mr. Clymer's condition prevented him from earning comparable wages, it was necessary to remand the cause for further proceedings.

Thereafter, Petitioners, E-Systems and Liberty Mutual Insurance Company, upon being denied a petition for rehearing, filed a petition for a writ of certiorari to review the decision of the United States Circuit of Appeals for the Fifth Circuit.

To date, Mr. Clymer continues to suffer his medical dysfunctions rendering him unable to either seek or perform gainful employment for the support of this family. He has remained unemployable since his medical evacuation by E-Systems from the Sinai Field Mission in early 1978. The opinion of the Fifth Circuit properly rejected the inopposite arguments of the Petitioners herein. The withholding of benefits to which Mr. Clymer's family has been entitled for the last five years has had devastating ramifications, both financially, medically and spiritually.

The Petition for Certiorari should be denied.

SUMMARY OF ARGUMENTS PRESENTED IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I.

The Fifth Circuit's determination that the Longshoremen's and Harbor Worker's Compensation Act (LHWCA) provides benefits if employment conditions aggravate a pre-existing condition resulting in disability does not conflict with the Supreme Court's decision in U. S. Industries/Federal Sheet Metal, Inc. v. Director, Office of Workers' Compensation Programs, United States Department of Labor, __ U.S. __, 102 S.Ct. 1312 (1982).

II.

The Petition for a Writ of Certiorari sets forth no substantial question of public importance nor does it present grounds for conflict jurisdiction which would warrant certiorari review by this Honorable Court.

ARGUMENT

POINT I

The Fifth Circuit's determination that the LHWCA provides benefits if employment conditions aggravate a pre-existing medical condition resulting in disability does not conflict with the Supreme Court's decision in U. S. Industries/Federal Sheet Metal, Inc. v. Director, Office of Workers' Compensation Programs, United States Department of Labor, __ U.S. __ 102 S.Ct. 1312 (1982).

The first basis in Petitioner's Petition for a writ of certiorari is the contention that a conflict exists between the Fifth Circuit's decision below and this Court's opinion in U. S. Industries/Federal Sheet Metal, Inc. v. Director, Office of Workers' Compensation Programs, United States Department of Labor, supra. Interestingly, Petitioner's claim that the Fifth Circuit did not review or cite to this court's decision in U. S. Industries, even though the decision was rendered almost nine months before the Fifth Circuit decided this case. To the contrary, the Fifth Circuit expressly rejected Petitioner's exhaustive arguments on this contention in rejecting the Petitioner's motion for rehearing.

In U. S. Industries this Court vacated and remanded a decision by the Court of Appeals for the District of Columbia Circuit on two grounds; 1) that the Court of Appeals improperly applied the Section 20(a) LHWCA presumption in support of a claim the Claimant did not even make; and 2) that the Court of Appeals improperly categorized Claimant's injury, which occured at home in bed to be included within the statutory definition of "injury" under the Act when no credible evidence was presented that Claimant's injury arose during the course of or out of employment.

An examination of the facts at bar and the Fifth Circuit's discussion thereof, makes clear that the factual

situation in which Mr. Clymer's injury arose is totally inapposite to the facts in U. S. Industries. First, in U. S. Industries, the ALJ determined that the Claimant had fabricated the entire employment accident which he claimed resulted in his injury and that in fact, his injury arose at home in bed. No such fabrication has ever been alleged in the cause herein. In U. S. Industries no testimony was offered that the Claimant's disability was a manifestation of an earlier injury or that it was employment related. Nonetheless, the D. C. Circuit Court of Appeals erroneously relied upon a theretofore unadvanced theory of recovery that the Claimant's injury was work related even though it occurred at home.

In the case at bar, the testimony and evidence conclusively support Respondent's claim that his disability is employment-bred. The Fifth Circuit did not improperly classify Respondent's injury, advance a novel theory of recovery, or dispute the medical testimony that was offered by either side. Rather, after careful review of the record, the Court looked to Petitioner's own medical expert and determined that the record contained undisputed, conclusive evidence that the conditions of employment did aggravate Respondent's pre-existing medical condition.

The Fifth Circuit did not depart from the essential requirements of the Act. It specifically limited the scope of its review to determine only whether there was substantial evidence in the record as a whole to support the ALJ's conclusion. After careful review, the Court determined that there was not, and that the evidence was conclusively to the contrary.

Respondents also contend that the Fifth Circuit failed to require proof of a causal connection between the aggravation of Plaintiff's pre-existing condition and his employment. To the contrary, the Fifth Circuit specifically addressed causality and determined that Petitioners' own medical expert : (1) was unable to express any opinion as to the cause of Respondent's medical deterioration, and (2) did testify that conditions of his

employment, i.e. dietary and environmental influences, may have aggravated a pre-existing medical condition. As such, the uncontroverted medical testimony supported Respondent's claim that his disability was employment related. The causation requirement is met if an employee establishes an aggravation of a pre-existing condition. Luper Stevedoring of Louisiana, Inc. v. Washington, 556 F.2d 268, 271 (5th Circuit 1977); Fulks Independent Stevedor Company v. O'Leary, 357 F.2d 812, 815 (9th Circuit 1966); McKinney v. Rowe Machine Works, Inc., 2 B.R.B.S. 329, 338 (October 7, 1975); Wheatley v. Adler, 407 F.2d 307, 312 (D.C. Cir. 1968).

Contrary to Petitioner's assertion, then, the Court of Appeals did not improperly substitute its judgment for that of the fact finder but merely reviewed the record as a whole and determined that there was a lack of competent substantial evidence to support the ALJ's decision.

Petitioner's argument that the decision below conflicts with this Honorable Court's decision in U. S. Industries, is unmeritorious. In reviewing the two cases, the material dissimilarity of the respective factual situations makes evident the reason for the Fifth Circuit's rejection of Petitioner's position on this issue. As there is no conflict between the decision below and this Honorable Court's decision in U. S. Industries, certiorari review is neither necessary nor appropriate.

POINT II

The Petition for a Writ of Certiorari sets forth no substantial question of public importance nor does it present grounds for conflict jurisdiction which would warrant certiorari review.

Respondent would respectfully assert that certiorari review of the decision of the United States Court of Appeals for the Fifth Circuit would be inappropriate in this case. Where there is a conflict in decisions of various Federal Circuit Courts of Appeal, a direct conflict with a Supreme Court Mandate or an issue of great public importance, the Supreme Court has granted certiorari review. Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394, 94 S.Ct. 1129, 39 L.Ed.2d 415 (1974); Morton v. Ruiz, 415 U.S. 199, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974); Pittsburg v. Alco Parking Corp., 417 U.S. 369, 94 S.Ct. 221, 41 L.Ed.2d 132 (1974); Curtis v. Loether, 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974); U. S. v. Cartwright, 411 U.S. 546, 93 S.Ct. 1713, 36 L.Ed.2d 528 (1973).

However, as Justice Harlan so eloquently stated in Sanks v. Georgia, 401 U.S. 144, 151, 91 S.Ct. 593, 27 L.Ed.2d 741 (1971):

> It has always been a matter of fundamental principle with this Court, a principle dictated by our very institutional nature and constitutional obligations, that we exercise our powers of judicial review only as a matter of necessity.

Respondent respectfully argues that no issue of great public importance is presented and that no conflict jurisdiction exists because the decision by the United States Court of Appeals for the Fifth Circuit is in harmony with the prior decisions of this Court and with its sister Courts of Appeal.

Likewise, Petitioners' argument regarding the timeliness of Respondent's claim is an inappropriate issue for presentment on certiorari review. The question when Respondent knew or should have known that his disability was employment related pre-

sents only a fact question and does not involve the delicate and deliberate decision making that could cause conflict between the courts of appeal. The issue was properly reviewed in detail and resolved by the 5th Circuit.

The issues presented for review by Petitioners do not involve novel questions of law or interpretations of the LHWCA. Petitioners are merely attempting to alchemize their dissatisfaction with a finding of disability in a routine worker's compensation case into a policy guise for certiorari review. Approximately five years have passed since Respondent was permanently and totally disabled by employment-bred circumstances beyond his control. Appropriate review has been sought and received, and all parties have had their day in court. Further review would be unnecessary and inappropriate particularly when this case presents no issues of great public importance which would require or justify issuance by this Court of a declarative ruling.

CONCLUSION

Respondent respectfully argues that the Petition for a Writ of Certiorari should be denied.

MCELROY & BOYD
2505 RepublicBank Dallas Tower
Dallas, Texas 75201

By: Sam Boyd
Samuel L. Boyd

and

By: Lila L. Abrams
Lila L. Abrams

CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing Brief has been delivered by certified mail, return receipt requested, to David W. Townend, Esq., of DeHay & Blanchard, 2300 South Tower, Plaza of the Americas, Dallas, Texas 75201, Attorneys for the Petitioners, on this 27 day of September, 1983.

Samuel L. Boyd

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Howard R. Clymer, respectfully moves pursuant to Rule 46, Rules of the Supreme Court, for leave to file the attached Brief in Opposition to Petitioner's Petition for a Writ of Certiorari, without complying with the printing requirements of Rule 33, Rules of the Supreme Court. Respondent has not previously been granted leave to proceed in forma pauperis in any of the proceedings below, but now finds his financial position so desperate that compliance with Rule 33, Supreme Court Rules, would cause him to bear an impossible and onerous financial burden. Respondent's Affidavit in support of this Motion, in the form approved by this Court, is attached hereto and incorporated herein.

WHEREFORE, Respondent respectfully requests that this honorable Court grant his Motion for Leave to Proceed in Forma

Pauperis and accept the attached Brief in Opposition to the Petition for a Writ of Certiorari which is in compliance with Rule 39, Rules of the Supreme Court.

Respectfully submitted,

MCELROY & BOYD

By Sam Boyd
SAMUEL L. BOYD

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ATTORNEYS FOR HOWARD R. CLYMER

AFFIDAVIT

I, Howard R. Clymer, being first duly sworn according to law, depose and say that I am the Respondent in the above entitled cause; that in support of my Motion to Proceed in Forma Pauperis requesting permission to file a typewritten Brief in Opposition to the Petition for Writ of Certiorari, I state that because of my proverty, I am unable to pay the costs involved with printing my Brief in Opposition as required by Rule 33, Supreme Court Rules; and that I believe my Brief is necessary for the Court's full and fair consideration and determination whether to grant certiorari review and that without permission to proceed in forma pauperis, I will be unable to present my Brief in Opposition to the Court.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of proceeding in this Court are true to the best of my knowledge and ability.

1. Are you presently employed?

ANSWER: No. My last permanent employment was with the Petitioner, E-Systems, Inc., and I received my last paycheck on March 11, 1978. At that time, my gross monthly wage was

$1,810.00.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source?

ANSWER: Yes. I did some painting and other light odd jobs for a neighbor in the Spring of 1983 and received $750.00.

3. Do you own any cash or checking or savings account?

ANSWER: No. I do not own any cash, checking or savings account. My wife owns a checking account, to which I do not have access, which currently has a balance of $30.00.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

ANSWER: I own a 1973 Pontiac station wagon which is in poor condition and valued at approximately $300.00. My wife and I own our own home which currently has an outstanding mortgage of $17,600.00, and my wife makes monthly mortgage payments of $271.81.

5. List of persons who are dependent upon you for support and state your relationship to those persons.

ANSWER: I was the sole source of support for my family, but since my injury I have been unable to seek or receive gainful employment. Since that time, my wife has become employed in a clerical position and is the sole means of support for my family. My 18 year old daughter still lives at home and does not contribute to the family support or maintenance.

I understand that a false statement or answer to any question in this Affidavit will subject me to penalties for perjury.

H R Clymer
HOWARD R. CLYMER

SUBSCRIBED AND SWORN TO BEFORE ME by the said Howard R. Clymer, this 26th day of September, 1983, to certify which witness my hand and seal of office.

Janice A Hutchison
Notary Public, State of Texas

My Commission Expires:
11-24-84